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No. 30

In the Supreme Court of the United States

OCTOBER TERM, 1929

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, APPELLEES

BRIEF FOR THE INTERSTATE COMMERCE COMMISSION

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For Interstate Commerce Commission.

DANIEL W. KNOWLTON,
Of Counsel.

SEPTEMBER, 1929.

INDEX

	Page
OPINIONS	1
JURISDICTION	2
QUESTION	2
THE STATUTE	2–3
STATEMENT	3–5
(a) Proceedings before the Commission	3–4
(b) Proceedings in the Lower Court	4–5
ASSIGNMENT OF ERRORS	5–6
SUMMARY OF ARGUMENT	6–7
CHRONOLOGICAL STATEMENT	7–9
ARGUMENT	9–45
(a) The interstate and foreign journey started when the wood pulp left the foreign mills and the continuity of that journey was not broken by the interruption at Hoboken	9–38
(b) The interruption at Hoboken was solely such as occurs generally in the case of import traffic coming in by vessel and moving out by rail, and was merely for separation and assortment for the convenience of shipment to its destination	38–45

71080—29——1

CASES CITED

American Steel & Wire Co. v. *Speed*, 192 U. S. 500 41
Atchison, Topeka & Santa Fe Ry. Co. v. *Harold*, 241 U. S. 371 .. 28
Atlantic Coast Line R. R. Co. v. *Standard Oil Co.*, 275 U. S. 257 .. 23, 43
Baltimore & Ohio Southwestern R. R. Co. v. *Settle*, 260 U. S. 166 .. 6, 10, 28
Carson Petroleum Co. v. *Vial et al.*, 279 U. S. 95 ..... 28, 29
Champlain Realty Co. v. *Brattleboro*, 260 U. S. 366 ..... 6, 7, 40
Chicago, Milwaukee & St. Paul Ry. Co. v. *Iowa*, 233 U. S. 334 .. 23
Coe v. *Errol*, 116 U. S. 517 27
Erie Railroad Co. et al. v. *United States*, 32 F. (2d) 613 1
Express Publishing Co. v. *G. H. & S. A. Ry. Co.*, 85 I. C. C. 203 .. 28
Goldsboro Chamber of Commerce Case, 91 I. C. C. 315 28
Hamersley Manufacturing Co. v. *Erie Railroad Co. et al.*, 126 I. C. C. 491; 148 I. C. C. 47 1
Hughes Bros. Timber Co. v. *Minnesota*, 272 U. S. 469 ..... 6, 7, 28
Louisiana v. *Texas & Pacific Ry. Co.*, 229 U. S. 336 22
Ohio Railroad Commission v. *Worthington*, 225 U. S. 101 ..... 28, 41
Pennsylvania R. R. Co. v. *Clark Coal Co.*, 238 U. S. 456 ..... 9, 35
Philadelphia & Reading Railway Co. v. *Hancock*, 253 U. S. 284 .. 6
Public Utilities Commission v. *Landon*, 249 U. S. 263 38
Railroad Commission of Louisiana v. *Texas & Pacific Ry. Co.*, 229 U. S. 336 ..... 6, 34
Railroad Commission of Ohio v. *Worthington*, 225 U. S. 101 .... 6, 7
Sabine Tram Case, 227 U. S. 111 ..... 6, 7, 22, 28, 32, 34
Savage v. *Jones*, 225 U. S. 501 39
So. Covington Railway v. *Covington*, 235 U. S. 537 9
Southern Pacific Terminal Co. v. *Interstate Commerce Commission*, 219 U. S. 498 ..... 6, 25, 28
Spaulding & Bros. v. *Edwards*, 262 U. S. 66 34
Stafford v. *Wallace*, 258 U. S. 495 42
State v. *Engle*, 34 N. J. L. 425 ..... 7, 40
Swift & Co. v. *United States*, 196 U. S. 375 ..... 6, 7, 34, 40
Texas & New Orleans R. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111 .. 6, 7, 22, 28, 32, 34

STATUTES CITED

Interstate Commerce Act, sec. 1 2-3
Urgent Deficiencies Act (U. S. C., Title 28, sec. 47) 2

In the Supreme Court of the United States

OCTOBER TERM, 1929

No. 30

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, appellants,

v.

ERIE RAILROAD COMPANY AND HOBOKEN MANUFACTURERS' RAILROAD COMPANY, appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY

OPINIONS

The specially constituted District Court (Circuit Judge Davis and District Judges Rellstab and Bodine) filed its written opinion on December 26, 1928 (R. 26–29) which is reported in 32 F. (2d) 613, under the title: *Erie Railroad Co. et al.* v. *United States.*

The reports of the Interstate Commerce Commission, hereinafter called the Commission, appear as Docket No. 16331, *The Hamersley Manufacturing Company* v. *Erie Railroad Company et al.*, 126 I. C. C. 491; (R. 14–20) (May 7, 1927) 148 I. C. C. 47; (November 2, 1928). (R. 7–13.)

JURISDICTION

The suit was commenced on December 17, 1928, under the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 219; U. S. C., Title 28, Sec. 47), to annul and set aside a certain order of the Commission, dated November 2, 1928, requiring the establishment of a rate of 10 cents per 100 pounds on imported wood pulp, in carloads, from Hoboken, N. J., to Garfield, N. J. (R. 14.)

The final decree, setting aside, annulling and suspending the said order of the Commission, was entered December 26, 1928. (R. 30.) The appeal was allowed on January 19, 1929. (R. 31–32.)

Pursuant to rule 12 of this Court, appellants on February 11, 1929, submitted a statement as to jurisdiction, and on April 8, 1929, the court found that probable jurisdiction had been shown.

QUESTION

The sole question is, does the Commission have jurisdiction to fix the all-rail rate on certain shipments of wood pulp moving from Hoboken, N. J., to Garfield, N. J., a distance of about 15 miles (R. 16), the pulp having been imported through the port of Hoboken and subsequently moving to the Hamersley Manufacturing Company at Garfield?

The level of the rate prescribed by the Commission is not involved.

THE STATUTE

Section 1 of the Interstate Commerce Act provides:

That the provisions of this Act shall apply to common carriers engaged in—

(a) The transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment; * * *

* * * * *

from one State or Territory of the United States, * * * to any other state or territory of the United States, * * * or from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States.

(2) The provisions of this Act * * * shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid; * * *.

STATEMENT

PROCEEDINGS BEFORE THE COMMISSION

By complaint filed December 4, 1924, subsequently amended, the Hamersley Manufacturing Company, engaged in the manufacture of paper at Garfield, N. J., alleged that the rates charged on imported wood pulp, in carloads, shipped between November, 1922, and September, 1924, and moving from foreign countries through the port of Hobo-

ken and transshipped by rail from Hoboken to Garfield, were and are unjust and unreasonable in violation of Section 1 of the Interstate Commerce Act, and prayed for reparation. (R. 69–72.) Rates from other ports, outside the State of New Jersey, to Garfield, were also attacked (R. 69–72), but need not be discussed here.

After extended proceedings before the Commission, including two hearings and two oral arguments, the Commission, on November 2, 1928, issued its report and order (R. 7–14), in which it found that: The shipments of imported wood pulp from Hoboken to Garfield, N. J., were subject to its jurisdiction (R. 9); that the rate was unreasonable to the extent it exceeded 10 cents per 100 pounds; and the Commission required the carriers to establish on or before January 10, 1929, on not less than 5 days' notice, a rate of 10 cents per 100 pounds on imported wood pulp, in carloads, from Hoboken to Garfield, N. J. (R. 14).

PROCEEDINGS IN THE LOWER COURT

On December 17, 1928, petition for injunction was filed (R. 2), and prayed that the order of "November 2, 1928, be declared null and void and be set aside, annulled, and suspended, and its enforcement, execution and operation be forever enjoined," and for "such other and further relief as may be proper in the premises" (R. 7).

The answer of the United States was filed on December 19, 1928 (R. 24), and on the same day

the Commission intervened (R. 21) and filed an answer (R. 22). In its petition below the carrier contended that the order of the Commission was invalid and should be set aside for the reason that:

> B. Said Order is made applicable to traffic and transportation over which the Interstate Commerce Commission has no jurisdiction and said order is not an order which the Commission is empowered to make by the provisions of the Interstate Commerce Act or by the provisions of any other Statute. (R. 4.)

After argument the District Court, on final hearing, rendered an opinion (R. 26–29) finding that the commerce involved was intrastate in character (R. 29), and stating its view that there were two independent transactions, one from the foreign point of origin to Hoboken and the other from Hoboken to Garfield (R. 29). The court granted a permanent injunction, annulling and setting aside the order (R. 30) prescribing a rate from Hoboken to Garfield. On January 18, 1929, appeal to this court was allowed. (R. 31.)

ASSIGNMENT OF ERRORS

While separate errors are assigned to certain holdings or the use of certain specific language of the District Court in its opinion (R. 33–34) the assignment of errors and the points relied upon, for the purpose of this argument, may be summarized under the general error of the District Court

in holding that the commerce involved was intrastate in character (R. 33).

SUMMARY OF ARGUMENT

(a) *The Interstate and Foreign Journey Started When the Wood Pulp Left the Foreign Mills and the Continuity of That Journey Was Not Broken by the Interruption at Hoboken.*

Swift & Company v. *United States*, 196 U. S. 375.

Southern Pacific Terminal Company v. *Interstate Commerce Commission, et al.*, 219 U. S. 498.

Railroad Commission of Ohio v. *Worthington, Receiver of the Wheeling & Lake Erie R. R. Co.*, 225 U. S. 101.

Texas & New Orleans R. R. Co. v. *Sabine Tram Co.*, 227 U. S. 111.

Railroad Commission of Louisiana v. *Texas & Pacific Ry. Co.*, 229 U. S. 336.

Philadelphia & Reading Ry. Co. v. *Hancock*, 253 U. S. 284.

Baltimore & Ohio Southwestern R. R. Co. v. *Settle, et al.*, 260 U. S. 166.

Champlain Realty Company v. *Brattleboro*, 260 U. S. 366.

Hughes Brothers Timber Co. v. *Minnesota*, 272 U. S. 469.

(b) *The Interruption at Hoboken Was Solely Such as Occurs in the Case of All Import Traffic Coming in By Vessel and Moving Out by Rail, and*

Was Merely for Separation and Assortment for the Convenience of Shipment to Its Destination.

State v. *Engle,* 34 N. J. L. 425.

Champlain Realty Company v. *Brattleboro,* 260 U. S. 366.

Hughes Bros. Timber Co. v. *Minnesota,* 272 U. S. 469.

Railroad Commission of Ohio v. *Worthington,* 225 U. S. 101.

Texas & New Orleans Railroad Company v. *Sabine Tram Co.,* 227 U. S. 111.

Swift & Company v. *United States,* 196 U. S. 375.

CHRONOLOGICAL STATEMENT

A. The Hamersley Manufacturing Co., Garfield, N. J., makes an offer to a New York broker, or mill agent (R. 45) to buy certain quantities of wood pulp (R. 46).

B. The mill agent or broker submits this offer by cable to the mill abroad. (R. 46.)

C. The foreign mill accepts the offer by cable, which information the New York broker confirms to the Hamersley Company.

D. A contract is then entered into by the New York broker and the Hamersley Company calling for shipment from abroad, (mill or point of origin not named) of certain quantities of a described wood pulp, to be distributed over a period named in the contract, place of delivery to be "Ex-dock New York." (R. 63.)

71080—29——2

E. The foreign mill ships the quantities ordered by the Hamersley Company—the bales destined for it may be a part only of a larger cargo—but the quantities ordered are always delivered to the Hamersley Company at Garfield. The bales are marked abroad with a brand, but are not so marked as to show the individual customer.

F. The foreign mill cables the New York broker showing the shipment aboard a certain steamer and specifying the customers. The tonnage intended for the Hamersley Company always goes to it. (R. 46.)

G. The New York broker pays for the pulp when it leaves the foreign port; this is done for the convenience of the customer (the Hamersley Company). (R. 47.)

H. On arrival of vessel at Hoboken, the mill agent or New York broker furnishes the Hoboken Manufacturers' Railroad a dock order (R. 49) and a bill of lading showing the receipt by the railroad company from the vessel of a certain quantity of wood pulp, destined to the Hamersley Company at Garfield. (R. 56.)

I. On certain shipments there may be some delay in forwarding by the railroad to Garfield, because of an arrangement between the broker and the Hamersley Company under which the pulp is shipped in lots of 2 or 3 cars to prevent congestion at Garfield. (R. 9.)

J. The New York broker never diverts shipments intended for the Hamersley Company to another customer. (R. 46.)

K. This constitutes a continuing purpose, and as a matter of fact the actual course of business by which Hamersley's shipments move from the foreign port to Garfield.

ARGUMENT

(a) The Interstate and Foreign Journey started When the Wood Pulp Left the Foreign Mills and the Continuity of That Journey was Not Broken by the Interruption at Hoboken

In *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, at pages 465–6, the court said:

> In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and the provisions of the Act to Regulate Commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply.

In *So. Covington Ry.* v. *Covington*, 235 U. S. 537, at page 545, is the following language:

> This court has repeatedly held that whether given commerce is of an interstate character or not is to be determined by what is actually done, and if the transportation is

> really and in fact between States, the mere arrangements of billing or plurality of carriers do not enter into the conclusion.

In *B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166, the court stated:

> * * * And whether the interstate or the intrastate tariff is applicable depends upon the essential character of the movement. That the contract between shipper and carrier does not necessarily determine the character was settled by a series of cases in which the subject received much consideration. * * * (Id. 170.)

With the above principles in mind we will now discuss the evidence in this case together with the findings of the Commission thereon. The Hamersley Manufacturing Company operates a parchment and waxed wrapping manufacturing plant at Garfield, N. J. (R. 15), a local point on the Erie Railroad about 15 miles distant from Hoboken, N. J. (R. 16). In its business the Hamersley Company uses large quantities of wood pulp, and this wood pulp is imported from Europe (R. 15) through Hoboken and other ports. In this suit only the shipments moving through Hoboken are involved. During the period involved in the complaint (November, 1922–September, 1924) and up to the time of the hearing, 306 carloads of imported wood pulp moved from Hoboken to Garfield. (R. 15–16.)

In its report the Commission first stated that to determine the question of whether the movement from Hoboken to Garfield was subject to its jurisdiction, it was necessary to understand the manner of conducting the business. (R. 8.) The Commission then stated:

> Complainant makes an offer to a broker in New York for a certain quantity of wood pulp. The latter cables the offer to a foreign mill and, if accepted by the latter, complainant is so advised. (R. 8.)

It appears that the broker in New York City through which the Hamersley Company transacts much of its business for this foreign wood pulp is the J. Anderson Company, and that the contracts entered into by and between the Hamersley Company and the J. Anderson Company are similar to contracts made "with other importers and mill agents." (R. 40.) The Anderson Company's connection with the transaction is stated by its Office Manager, Mr. J. S. Tucker, who, at the hearing before the Commission, said:

> * * * I am familiar with the importation of wood pulp. The J. Anderson Company are mill agents. They represent mills manufacturing wood pulp in foreign countries; certain specified mills. We executed contracts with the Hamersley Manufacturing Company for shipment to them of the imported wood pulp, such as that which I have described here. I am familiar with the manner in which the wood pulp is shipped

from the foreign port to the Hamersley Manufacturing Company. When the Hamersley Manufacturing Company contracts with us for the shipment of wood pulp, we send a copy of the contract abroad, if that is what you mean. In the first place the Hamersley Manufacturing Company will make us an offer for a certain quantity of wood pulp, and we submit their offer by cable to the mill abroad. The mill then has to accept that by cable, which we then confirm to the Hamersley Manufacturing Company, and the contract is made such as you have had here. (R. 45–6.)

* * * We often have offers that Hamersley makes—they place with you to purchase. We often combine those in one cable, but always specify the amount for each customer—that is, each customer offers to buy so much. We never sell to anybody any of this wood pulp while it is en route—that is, after it leaves. We never make a contract with any purchaser to cover stuff which is in transit; we are mill agents on commission. The orders are obtained from the customers before they are sent to the mills abroad. (R. 47.)

The Commission then said:

A contract is then made between complainant and the broker calling for a certain quantity of wood pulp to be delivered with [in] a specified time on dock at New York Harbor. (R. 8.)

To suport this we invite attention again to Mr. Tucker's testimony, together with copies of two contracts (unnumbered exhibits). (R. 65; 66.) The testimony of Mr. Tucker is:

> * * * The mill then has to accept that [offer of Hamersley] by cable, which we then confirm to the Hamersley Manufacturing Company, and the contract is then made such as you have had here. (R. 45–6.)

The following testimony then occurs:

> * * * "does the shipper there" [in the foreign country] "always know that the shipment he is making on any of these contracts is going to the Hamersley Manufacturing Company?
>
> "A. Yes; he does, and his cables of shipments specify the customers for whom the pulp is intended.
>
> "Q. You have cables?
>
> "A. And the quantities; yes.
>
> "Q. Showing the shipment aboard a certain steamer of certain lots of wood pulp?
>
> "A. That is correct." (R. 46.)
>
> * * * We never sell to anybody any of this wood pulp while it is en route—that is, after it leaves. We never make a contract with any purchaser to cover stuff which is in transit; we are mill agents on commission. The orders are obtained from the customers before they are sent to the mills abroad. (R. 47.)

Mr. Goldberg, General Manager of the Hamersley Company, testified:

> * * * Invariably we execute a contract with these mill agents or brokers for the purchase of these shipments of wood pulp. The contract always states that shipments are to be made from the foreign mill to us. From a financial standpoint or from the standpoint of the broker or the agent, their way of handling it is to base the price on board docks. The universal practice on wood pulp is to name the price ex-dock, New York. The contract reads shipment from abroad to us. (R. 40.)
>
> * * * There is no substantial difference in the language of the various contracts with the various mill agents or brokers; * * * (R. 40.)

There is reproduced in this record (R. 63; 66) copies of two original contracts for the purchase of wood pulp, the mode and place of delivery being shown "Ex-dock New York," (R. 63; 66) said contracts being executed by the Hamersley Company with the brokers or agents, the contracts being accepted by the Hamersley Company on the one hand and by the broker or agent on the other. These contracts specifically show the Hamersley Company contracted for the purchase of specified quantities of wood pulp long in advance of shipment; one contract covering wood pulp to be delivered February to December, 1925, inclusive, being dated October 6, 1924 (R. 63), and the other,

covering February-April (1922), being dated January 16, 1922 (R. 66). The place of delivery of the shipments was to be "Ex-dock New York." (R. 63.) That the shipments were to be made from foreign mills abroad is evidenced by the words in the Anderson contract "for shipment from abroad at the rate of 350 tons per month from February to December, 1925, inclusive," (R. 63), and in the Beebe Contract "shipment from Konigsberg" (R. 66).

Mr. Goldberg further testified:

> * * * Each contract is a contract for one particular class of pulp that we have bought from that particular concern.
>
> These contracts are always filled with the grade that we order. When we order the grade, sometimes we know where it is going to be produced, not always, other than we know it is foreign pulp and coming from abroad. We don't always know the shipping point. (R. 41.)
>
> "MR. PIERCE [Counsel for carrier]. We will concede that he knows it is all coming from Norway or Sweden, or wherever it is; that it is bound to come from a foreign country; that he knows when he orders it that is where it comes from; and we will go further and concede that it does in fact come from there." (R. 41.)

Continuing the Commission found:

> Complainant thus knows the grade or quality of the wood pulp to be supplied, but does

> not know the name of the foreign mill. The contract calls for delivery "on" or "ex" dock at New York and the price paid by complainant is based on delivery there. This is for the purpose of determining what portion of the total transportation charges is to be borne by each party. (R. 8.)

To substantiate this, we refer the court to the contracts before mentioned. (R. 63; 66.)

These contracts show under "Quantity and Description of Goods": Three thousand eight hundred and fifty (3850) tons #823 prime, strong unbleached sulphite (Kronstadter #1) (R. 63) and 700 tons #467 Konigsberg #467 German Mitscherlich sulphite (R. 66). The mode and place of delivery are shown as "Ex-dock New York" in both instances. (R. 63; 66.)

Under "Price" appears "2¾¢ per lb., air dry weight; exclusive of duty, if any" in one contract (R. 63), and "at 2.88¢ per lb., ex-dock N. Y., 'exclusive of duty'" in the other contract (R. 66).

Mr. Goldberg testified that each contract was for a particular class of pulp bought from a particular concern; that these contracts are always filled with the grade ordered, and that when a grade is ordered, it is not always known where it will be produced, other than it would come from abroad. (R. 41.) This witness further stated:

> A. We know that the pulp wood is marked by a number or brand, not actually marked for anybody at any time so far as my experience goes.

Q. When is the marking that shows that it is for the Hamersley Manufacturing Company put on it, if ever?

A. If it is ever put on, it is put on on the other side. There is nothing put on except the number or the brand or the trade mark, or whatever it may be to identify it. (R. 43–44.)

When we contract for the shipment to us of imported wood pulp, we do not know whether the boat on which it is going to be shipped is going to dock at Hoboken or at New York somewhere; we do not know on what boat it is going to be shipped until after it is shipped and the broker notifies us; then we don't bother with it. (R. 45.)

Mr. Tucker's testimony was:

A. The customers all alike buy on dock, or ex-dock, port of arrival. We receive cable advices from abroad specifying the shipments and quantities. We in turn notify the customers the name of the steamer and the quantities.

Q. That is while in transit?

A. While in transit, and the expected date of arrival. * * * (R. 46.)

* * * you see the customer buys it on dock, New York. He has to pay the freight charges from the port of arrival to his factory or mill, and he can save freight charges by sometimes sending it the entire distance by boat instead of by rail. In other words, these terms on dock or alongside vessel are merely to indicate from what point the con-

> sumer is going to bear the freight and other transportation charges. In our case—I don't know how it is about other importers—in our case all the mills we represent insist on selling on dock, port of arrival. They will not give terms over the side of the steamer on to lighter. (R. 46–47.)

The next statement of the Commission is:

> * * * The wood pulp is marked abroad by a brand but not with complainant's name. It is consigned to the broker at New York. (R. 8.)

Concerning this Mr. Goldberg testified:

> A. We know that the pulp wood is marked by a number or brand, not actually marked for anybody at any time so far as my experience goes. (R. 43.)
>
> * * * It is the custom in the pulp trade that foreign shipments, regardless of where the contracts are made—they may be made for shipments to Chicago, the steamers land in New York and the broker handles it for reshipment but it goes right through from the other side, to the mill, frequently without interruption. (R. 42.)

Continuing the Commission found:

> * * * The bales destined for complainant may be only a part of a large cargo but the total number of bales allotted to it is always delivered at Garfield. (R. 8.)

This is substantiated by the testimony of Mr. Goldberg that:

* * * they [the brokers] often tell us the shipment consists of a thousand bales, of which 500 are for you. (R. 44.)

Mr. Tucker testified:

A. * * * his [the foreign shipper's] cables of shipments specify the customers for whom the pulp is intended.

Q. You have cables?

A. And the quantities; yes.

Q. Showing the shipment aboard a certain steamer of certain lots of wood pulp?

A. That is correct.

The cables indicate what tonnage is going to Hamersley, and what tonnage might go to other customers. That tonnage always goes to Hamersley which is on board this vessel when it leaves the foreign port—that is, the tonnage specified in the cable, to fill the Hamersley order. I have never known of a case of Hamersley shipments being diverted to anybody else or a portion of the shipments. (R. 46.)

Continuing, the Commission stated:

* * * The broker gives dock orders to the Hoboken Manufacturers' Railroad specifying delivery of the required number of bales, and makes out the bill of lading for the shipments to Garfield. (R. 8–9.)

Mr. Tucker's testimony on this was:

* * * Upon arrival of the steamer, I personally or somebody in the office staff make out the inland bill of lading and give the instructions to the carriers.

Q. For the forwarding of the shipments from alongside the vessel?

A. From dock or alongside the vessel, over the side of the vessel if the customer wants it that way, but always on dock unless he specifies over the side of the steamer. (R. 46.)

Mr. Hobbs, Freight Agent, Hoboken Manufacturers' Railroad, said:

> The broker furnishes us a dock order, and it reads, Please deliver to the Erie Railroad, or Hoboken Manufacturers Railroad, so and so, 50 bales of wood pulp, ex-steamship so and so. He puts ex-steamship so and so on that order, so the steamship people will be able to designate what lot it is. (R. 49.)

Continuing, the Commission said:

> * * * The bills of lading carry an entry "from S. S. * * *, Pier * * *, Hoboken, N. J." (R. 9.)

On this, the court is respectfully referred to the typical bill of lading (R. 56), introduced as Exhibit 15. It will also be noted that this bill of lading states:

> Received, subject to the classifications and tariffs in effect on the date of the issue of this bill of lading, from steamer "Pres. Harding," Pier 3, Hoboken, N. J., the property described below * * *
>
> Consigned to The Hamersley Mfg. Co.
>
> Destination, Garfield, State of N. J. (R. 56.)

certain quantities of wood pulp, described in the bill of lading.

The next statement of the Commission is:

> * * * By arrangement between complainant and the broker the wood pulp is usually shipped in lots of two or three cars to enable complainant to unload promptly, and thus prevent congestion on the industrial tracks at Garfield. (R. 9.)

Mr. Goldberg testified on this point:

> * * * when we are advised by a broker that a shipment for us containing, let us say, a thousand bales, is aboard a certain steamer on its way to New York at Hoboken, due to arrive at a certain time, that the brokers have general instructions in writing that upon the arrival of that shipment * * * at the port, that it be distributed from the port over as many days as possible in order that we may be able to unload the cars with our facilities on those days. Very often in addition are given specific instructions, so that we have sometimes had 30 cars set in there in one day, and we can not unload them fast enough without incurring tremendous charges and additional expenses. We have standing instructions with these brokers or mill agents that they distribute as they arrive on these boats—stretch them out as much as they can. I presume that necessarily results in some of these cars laying in Hoboken for several days at a time. If they all came in at one

time, let us say 20 cars, it would not be possible for us to handle that many cars within the regular time. We would have a good many extra days for the unloading. (R. 44–45.)

The concluding sentence by the Commission is:

Pulp is not shipped to the broker for sale to customers to be obtained after its arrival. (R. 9.)

On this Mr. Tucker said:

* * * We never sell to anybody any of this wood pulp while it is en route—that is, after it leaves. We never make a contract with any purchaser to cover stuff which is in transit; we are mill agents on commission. The orders are obtained from the customers before they are sent to the mills abroad. (R. 47.)

The Commission then called attention to the carriers' contentions, as follows:

Defendants contend that the title to the goods does not pass to complain[an]t by the terms of the contract until the broker at New York has taken affirmative action after the wood pulp has been unloaded by the steamship company on its docks; and that the movement thence by rail to Garfield is an entirely independent transaction. They urge that it is a reshipment of goods from a distributing point in intrastate commerce, and accordingly beyond our jurisdiction. *Texas & N. O. R. R. Co.* v. *Sabine Tram Co.*, 227 U. S. 111; *Louisiana* v. *Texas & Pacific*

Ry. Co., 229 U. S. 336; *Chi., Mil. & St. P. Ry.* v. *Iowa*, 233 U. S. 334; *Atl. C. L. R. R. Co.* v. *Standard Oil Co.*, 275 U. S. 257, are cited to support this view. On exceptions they state that there is no evidence to show a continuing intent of any of the parties that any specific bales comprising a part of the steamer shipment shall go to the complainant. (R. 9.)

The conclusions and findings of the Commission were then stated, as follows:

> The record convinces us that the broker acts only as an agent, and that from the time the pulp is placed on board steamers at foreign ports there is a continuing intent on the part of the shipper that it shall be transported to Garfield, and therefore, that the traffic is of the character over which we have jurisdiction. The time of passing title to complainant is immaterial in so far as the character of the transportation is concerned. (R. 9.)
>
> * * * * *
>
> We find that the rate from Hoboken to Garfield was, is, and for the future will be unreasonable to the extent that it exceeded, exceeds, or may exceed 10 cents. * * * (R. 12.)

It seems obvious from the above that there is a continuing intent on the part of the foreign mill, the New York broker, and the American customer to have a particular brand and quantity of wood pulp transported from the foreign mill direct to

Garfield, N. J., without any interruption except that necessary in the importation of all goods from abroad. Also the bill of lading the rail carrier *requires to be issued* (R. 52), indicates the name of the steamer, the pier at which it is docked, and the fact that the goods are destined to the Hamersley Manufacturing Company, Garfield, N. J. (R. 56.)

The handling of the goods and compulsory rebilling at the port of Hoboken, are but *incidents* in the through transportation of the wood pulp from the foreign mill to Garfield, N. J., and do not change the character of the transportation, which at all times is "from a point in a foreign country to a point in the United States."

Further, the witness for the carriers, who testified as to how the shipments of wood pulp are handled at Hoboken, said that although he was fully familiar with the manner of handling of import shipments at Hoboken and had been employed by the Hoboken Manufacturers Railroad for a great many years, his line never received through steamship bills of lading (R. 52), and that when a shipment of any kind which is imported, arrives at Hoboken, the carrier gets the identical dock order and the identical kind of railroad bill of lading, either through a broker or through the owner of the goods, as it does in the case of wood pulp (R. 52); and that so far as the carriers know, they would never be in a position to distinguish between a shipment which moved under a through bill of lading, if

such were possible, and one moving on a steamship bill of lading to the port of entry and the carriers' bill of lading beyond, because, in any event, his line would demand that a new railroad bill of lading be issued at Hoboken before the shipment could move from Hoboken to the interior point (R. 52–53). Would not the effect of this be to hold that if the wood pulp involved here is not import traffic then all shipments imported through Hoboken are in intrastate, and not in foreign, commerce?

The seller in the foreign country knew at all times that so many bales of wood pulp of a particular brand were destined to Hamersley at Garfield (R. 46). Merely because the contract indicated that the Hamersley Company would have to bear the transportation charges from the port of entry, and the shipper from the foreign mill to the port of entry (R. 47), has nothing to do with the determination of the character of the traffic. The record further shows that the foreign miller always knows that the shipments he is making under these contracts are going to the Hamersley Company, and that his cables to the "broker" show the shipment by a specified steamer of certain quantities of wood pulp, and specify the customers for whom the pulp is intended. (R. 46.)

Under these circumstances we think the facts make this case even stronger than *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,*

219 U. S. 498, where the Commission's jurisdiction was sustained. In the case last cited there was involved the validity of a Commission order requiring the Terminal Company to cease and desist from granting certain advantages and preferences to one Young, a shipper of cottonseed products at Galveston, Tex., over the Terminal's docks and piers, and in allowing Young storage and handling room on its piers and docks while denying such privileges to other shippers.

In stating a contention similar to the one now being advanced here, and in overruling it, this court said:

> The last contention advanced is that "the order of the Commission transcends its jurisdiction, in that it regulates commerce purely State and intrastate, and also purely foreign commerce, neither of which is subject to its authority."
>
> In support of this contention it is insisted that the evidence shows the following facts; The cake and meal purchased by Young are bought by him in Texas, Oklahoma, Louisiana and Arkansas, but chiefly in Texas, and shipped to him on bills of lading and way bills, showing the point of origin in those States and the destination at Galveston. The purchases are made for export, there being no consumption of the products at Galveston. His sales to foreign countries are sometimes for immediate and sometimes for future delivery, irrespective of whether he has the product on hand at Galveston.

At times he has it on hand. At times, therefore, orders must be filled from cake to be purchased in the interior or then in transit to him. When the cake reaches Galveston it is ground into meal and sacked by Young, and for the meal thus ground and such meal as has been brought to his customers he takes out ships' bills of lading made to his order.

* * * * *

* * * the manufacture or concentration on the wharves of the Terminal Company are but incidents, under the circumstances presented by the record, in the transshipment of the products in export trade and their regulation is within the power of the Interstate Commerce Commission. To hold otherwise would be to disregard, as the Commission said, the substance of things and make evasions of the act of Congress quite easy. It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harriburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe* v. *Errol,* 116 U. S. 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have "actually started in the course of transpor-

tation to another State, or delivered to a carrier for transportation." (Id. 525–527.)

It will be noted that in the *Southern Pacific Terminal Co. Case,* the court said, p. 526: "The purchases are made for export, there being no consumption of the products at Galveston." In this case there is likewise no consumption of the products at Hoboken, as all the wood pulp, whether intended for shipment to Garfield or somewhere else, has, so far as the record shows, a rail movement beyond Hoboken. The fact that some of the bales may remain on the docks or piers several days, awaiting cars or so as not to overcrowd the somewhat limited unloading facilities of the Hamersley Company at Garfield, does not break the continuity of the movement. (*Carson Petroleum Co.* v. *Vial, et al.,* 279 U. S. 95 (decided April 8, 1929).)

Other cases supporting our contention that the commerce involved is interstate and/or foreign in character, are *B. & O. S. W. R. R. Co.* v. *Settle,* 260 U. S. 166; *Ohio R. R. Comm.* v. *Worthington,* 225 U. S. 101; the *Sabine Tram Case,* 227 U. S. 111; *Goldsboro Chamber of Commerce Case,* 91 I. C. C. 315; *Express Publishing Co.* v. *G. H. & S. A. Ry. Co.* 85 I. C. C. 203–4; *Atchison, Topeka & Santa Fe Co.* v. *Harold,* 241 U. S. 371; and *Hughes Bros.* v. *Minnesota,* 272 U. S. 469, 475.

The latest decision of this court on this subject is its decision of April 8, 1929, in *Carson Petroleum Co.* v. *Vial, et al.,* 279 U. S. 95, and the decision in the *Carson Case* is quite persuasive of the jurisdic-

tion of the Commission here. In the *Carson Case,* this court stated the general principle that "there has been a liberal construction of what is continuity of the journey, in cases where the court finds from the circumstances that export trade has been actually intended and carried through." The facts in the *Carson Case* were:

The Carson Petroleum Company purchases oil from refiners in the Mid-Continent Field (Kansas, Oklahoma and Texas). The oil is shipped in railroad tank cars consigned to the Carson Company at St. Rose, La., a few miles above New Orleans. At St. Rose there are tanks and equipment for assembling or receiving from railroad tank cars cargoes of oil and loading it aboard ships for export. No oil was sold at St. Rose except what is exported. The only business conducted there is the unloading of the oil from railroad tank cars into storage tanks and the loading of the oil from the storage tanks aboard vessels for shipment to foreign ports. The shipments from the Mid-Continent Field to St. Rose were not made on through bills of lading, but on an export rate, which was lower than the domestic rate. The oil was of a high grade especially adapted for use in foreign automobiles. The Carson Company takes orders for cargoes of oil from foreign buyers, who charter the vessels to transport the oil from St. Rose to the foreign ports. The company always has orders for more oil than there is at St. Rose, and

buys the oil in the Mid-Continent Field to fill orders already received from foreign buyers. The oil in each tank car is not assigned to any shipment abroad, but is pumped into large storage tanks, where it is held either until a ship arrives or until enough oil is accumulated to make up a cargo. It takes 10 to 16 trains of tank cars, or 300 to 500 cars, to make up a cargo of oil. A delivery of the oil thus sold is made by loading the oil aboard the ship chartered by the buyer. Until the oil is loaded aboard ship it belongs to the Carson Company, is insured in its name, and loss is payable to it. At times there is oil in the tanks awaiting the arrival of a ship, and at other times the ship is awaiting the accumulation of enough oil to make up a cargo. To save heavy demurrage charges, the Carson Company endeavors to have enough oil on hand at St. Rose to fill each order promptly on arrival of the ship. Because of demurrage charges on tank cars and on steamships, it would be impracticable to carry on the export business in oil by any other method than storage in tanks as the trains of oil arrive, and shipping from the accumulation when the ships arrive. The oil is not treated in any way between the time it is placed in the storage tanks and on the ships. It is never kept at St. Rose longer than necessary, and the quantity on hand is always awaiting either the arrival of a ship or the accumulation of a sufficient quantity to load a ship.

After setting out the facts as above, this court summarized the claim of the State authorities that the oil was subject to local taxation by saying:

> * * * On the other hand, the State authorities claim that there were two separate shipments—the one which ended when the tank cars arrived and were unloaded at St. Rose, and the foreign shipment, which began when the oil was loaded aboard ship for a foreign port. Hence they contend that while the oil was stored in the tanks at St. Rose, under the protection of the State and local government, it was subject to State and local taxation, even though intended and prepared for exportation.

These claims of the State of Louisiana in the *Carson Petroleum Case* are similar to the grounds upon which the District Court set aside the Commission's order in this case. The District Court stated:

> It is to be borne in mind that there are always two transactions. The American manufacturer deals with the New York broker for obvious reasons. The foreign producer deals with the New York broker for similar reasons. The pulp belongs to the broker when it arrives in New York Harbor, and he initiates the rail transportation. Without the independent act of the New York broker the pulp would never move beyond New York Harbor. The broker stands in the transaction not as a means of changing the

> nature of the transaction but as the instigator of an independent transaction. (R. 29.)

In the *Carson Case* this Court said:

> The crucial question to be settled in determining whether personal property or merchandise moving in interstate commerce is subject to local taxation is that of its continuity of transit.

After reviewing pertinent decisions, this Court based its decision that the commerce involved was interstate in character largely upon the *Sabine Tram Case,* 227 U. S. 111, saying:

> In *Texas & New Orleans R. R.* v. *Sabine Tram Co.,* 227 U. S. 111, the question was whether the rates charged on shipments of lumber on local bills of lading from one point in Texas to another, but destined for export, were intrastate or foreign commerce. The exporter purchased the lumber from other mills in Texas with which to supply its sales in part. It did not know when any particular car of lumber left the starting point into which ship or to what particular destination the contents of the car would ultimately go, or on which sale it would be applied; this not being found out until its agent inspected the invoice mailed to and received by him after shipment. The lumber remained after arrival at the shipping port in the slips or on the dock until a ship chartered by the exporter arrived, when the exporter selected the lumber suited for that cargo and shipped it to its destination. There was no local

market for lumber at the port of shipment, the population of which did not exceed fifty, and the exporter had never done any local business at that point. This Court held that the shipments to the point of shipment from other points of Texas were in interstate and foreign commerce and should pay rates accordingly. The Court said, p. 126:

"The determining circumstance is that the shipment of the lumber to Sabine was but a step in its transportation to its real and ultimate destination in foreign countries. In other words, the essential character of the commerce, not its mere accidents, should determine. It was to supply the demand of foreign countries that the lumber was purchased, manufactured and shipped and to give it a various character by the steps in its transportation would be extremely artificial. Once admit the principle and means will be afforded of evading the national control of foreign commerce from points in the interior of a State. There must be transshipment at the seaboard, and if that may be made the point of ultimate destination by the device of separate bills of lading, the commerce will be given local character, though it be essentially foreign."

Again this Court said, p. 130:

"And the shipment was not an isolated one but typical of many others, which constituted a commerce amounting in the year 1905 to 14,667,670 feet of lumber, and in the year 1906, 39,554,000 feet. Nor was there a

break, in the sense of the Interstate Commerce law and the cited cases, in the continuity of the transportation of the lumber to foreign countries by the delay and its transshipment at Sabine. *Swift & Co.* v. *United States,* 196 U. S. 375. Nor, as we have seen, did the absence of a definite foreign destination alter the character of the shipments."

See also *Railroad Commission* v. *Texas & Pacific Ry.,* 229 U. S. 336; *Spaulding & Bros.* v. *Edwards,* 262 U. S. 66, 70.

We do not think the *Sabine Tram case* can be distinguished from the one before us. It has been suggested that in the present case there was a failure to fix the exact point of destination abroad before shipment and that this prevents the continuity required in a continuous exportation. But there was the same indefiniteness on this point in the *Sabine Tram case.* Then, it is said, there was no separation of the various shipments of oil from the interior points to the tanks and thence to ships at the port of shipment. But in the *Sabine Tram case* cars of lumber were sent to the transshipment point without regard to the filling of one order or another. In both cases the delay in transshipment was due to nothing but the failure of the arrival of the subject to be shipped at the same time as the arrival of the ships at the port of transshipment. The use of the tanks at the point of transshipment can not be distinguished from the storing of the lumber on the docks or in the slips between them till the ves-

> sel to carry it should be ready. The quickness of transshipment in both cases was the chief object each exporter plainly sought. In both cases the selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad and for no other purpose. No lumber or oil was sold there but that to be exported. There was no possibility of any other business there. * * *

This court has long recognized that the question as to where title passes is not determinative of the character of the commerce. In *Pennsylvania R. R. Co.* v. *Clark Coal Co.*, 238 U. S. 456, at pages 465–6, the court said:

> In determining whether commerce is interstate or intrastate, regard must be had to its essential character. Mere billing, or the place at which title passes, is not determinative. If the actual movement is interstate, the power of Congress attaches to it and the provisions of the Act to Regulate Commerce, enacted for the purpose of preventing and redressing unjust discrimination by interstate carriers, whether in rates or facilities, apply.

Yet the District Court in this case bases its opinion that the commerce involved was intrastate largely on the question of where the title to this wood pulp passed. It said:

> * * * How can it be said that he [the foreign shipper] has any concern or any in-

> tention that pulp should reach the Hamersley Manufacturing Company or anyone else? And if he did have such intention, what of it since the New York broker has title until the pulp is delivered on board the cars at Hoboken. * * * If loss has occurred at sea, it would not fall on the Hamersley Company, because it has no title. It would fall, however, on the New York broker, because he has paid for the goods. * * * The pulp belongs to the broker when it arrives in New York Harbor, and he initiates the rail transportation. Without the independent act of the New York broker the pulp would never move beyond New York Harbor. The broker stands in the transaction not as a means of changing the nature of the transaction but as the instigator of an independent transaction. (R. 29.)

This is where the District Court erred, because if, as the court finds (R. 29), the title passed from the shipper to the broker when the goods were loaded aboard the vessel at the foreign port, it would then be undisputed that at least, from the time the shipments left the foreign port, it constituted a through shipment from that port direct to Hamersley Manufacturing Company at Garfield. Under such circumstances, the re-billing and interruption at Hoboken would be only incidents in the through transportation.

Nor do we see the relevancy of the statement in the opinion of the District Court that "the railroad company has nothing to do with determining

the ultimate destination of the pulp." (R. 27.) So far as we know that determination never really lies with the carrier. It is solely a function exercised by the shipper. The carrier is the instrumentality of transportation of which the shipper and consignee, acting in concert, avail themselves in having the goods carried from the point of origin to final destination.

The lower court stated further that if loss occurred at sea it would fall, not on the ultimate consignee at Garfield, but on the "broker." (R. 29.) We submit this is of no effect in determining the character of the transportation from a jurisdictional standpoint. The liability for such loss is subject to various circumstances dependent upon terms of sale and contracts not controlling in the determination of whether the transportation is subject to Commission jurisdiction.

The District Court also held that:

> * * * mere knowledge by the foreign shipper that the pulp sold to the New York broker is purchased for resale cannot make the shipment by the New York broker to his New Jersey vendee a part of the original movement. (R. 29.)

The contracts in evidence themselves prove the pulp is not "purchased for resale." It has been sold to the ultimate consumer long before the shipment started from the foreign mill. If the "broker" or mill agent *"purchases" the pulp at all,* he does so, *not for resale,* but in fact for *delivery to Hamersley*

at Garfield, with whom he has contracted in advance of shipment, to supply the pulp at stated intervals. The "broker" offered unimpeached testimony that he never sold wood pulp to *anyone* except that covered by contracts executed with customers prior to shipment from the foreign mill. (R. 47.)

The court's statement "without the independent act of the New York broker the pulp would never move beyond New York Harbor" (R. 29) is subject to comment. The "broker" testified that what he did upon arrival of the goods at the Hoboken docks, was done "as a matter of courtesy." (R. 47.) It seems obvious that without any act of the "broker" it would have been incumbent upon either the customer (Hamersley), or the foreign mill itself, to execute a rail bill of lading to Garfield, which the carrier testified was necessary on all freight. This is clear from the contract which specifies shipments are to be made to Hamersley Mfg. Co., Garfield, N. J., from "*abroad,*" at a price "Exdocks New York." (R. 63; 66.)

(b) The interruption at Hoboken was solely such as occurs generally in the case of import traffic coming in by vessel and moving out by rail, and was merely for separation and assortment for the convenience of shipment to its destination

In *Public Utilities Commission* v. *Landon,* 249 U. S. 236, the court, at page 245, said:

> * * * Interstate commerce is a practical conception and what falls within it must be determined upon a consideration of established facts and known commercial methods

This court, in *Savage* v. *Jones,* 225 U. S. 501, said:

> * * * commerce among the States is not a technical legal conception, but a practical one drawn from the course of business. (Id. 520.)

The "known commercial methods" or "course of business" with respect to import traffic, are well known. Import traffic is generally subjected to considerable delays in transfer at ports of entry from steamers to cars. The property must be unloaded first upon docks alongside vessels. It is subject to checking and inspection by customs officials. Much detail is involved before the freight can be trucked from the docks to the railway yards and loaded into cars. These delays are not peculiar to the wood pulp here in issue but exist with respect to all import traffic. The only "delay" with respect to this wood pulp occurred in certain instances where a larger cargo was received at one time than could be unloaded with the facilities existing at Garfield. In the *Carson case* there was "delay" because the oil was pumped into storage tanks, to be held either until a ship arrives or enough oil is accumulated to make up the cargo; nevertheless this court held such oil was not subject to local taxation. No part of the wood pulp here involved goes into a warehouse for storage, but is unloaded on to the steamship pier, and then loaded direct by the Hoboken Manufacturers' Railroad on to the cars. (R. 49.)

In *State* v. *Engle,* 34 N. J. L. 425, cited with approval in *Champlain Realty Company* v. *Brattleboro,* 260 U. S. 366, coal mined in Pennsylvania was shipped by cars to Elizabethport, N. J., to be thence shipped by water to other markets for the purpose of sale. At Elizabethport on tidewater the coal was deposited and separated according to its different sizes, and when a cargo of one size was obtained it was shipped to points in other states as soon as a vessel could be chartered to carry it, no coal being sold for consumption at Elizabethport. The Court said:

> The power of the state to tax the subjects of commerce, where their transit for the purposes of commerce has ceased, and they have become incorporated and mixed up with the mass of property in the community, is well settled. But that a tax on property belonging to a citizen of another state, in its transit to market in other states, which is delayed within this state, not for the purpose of sale, but merely for separation and assortment for the convenience of shipping to its destination, is a tax on commerce among the states, is too plain to require argument.
>
> Delay within the state, which is no longer than is necessary for the convenience of transshipment for its transportation to its destination, will not make it property within the state for the purpose of taxation.

Swift & Company v. *United States,* 196 U. S. 375, is one of the cases involving an alleged combination in restraint of trade, in which this Court said:

> * * * commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. * * *
>
> It should be added that the cattle in the stock yard are not at rest even to the extent that was held sufficient to warrant taxation in *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500. (Id. 398.)

How much stronger is the instant case where the interruption at tidewater was not for the purpose of procuring a purchaser, but solely for the purpose of transferring from water to rail transportation.

Railroad Commission of Ohio v. *Worthington,* 225 U. S. 101, was a case involving the right of the Ohio Railroad Commission to regulate the railroad freight rate on coal mined in Ohio and shipped by rail, under an export freight rate, either to Huron or Cleveland, where the railroad has elaborate facilities for loading into vessels. The coal may be accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time, when it is put upon vessels

and shipped out of the State, and on those facts this Court held:

> By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the commission, which is in controversy here, is applicable alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, * * *. (Id. 108.)

Stafford v. *Wallace,* 258 U. S. 495, also is of interest. In that case, involving the validity of the Packers' and Stockyards' Act, and in describing the manner of doing business in the stockyards, this Court said:

> The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carload and train load lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one State to another. Such transactions can not be separated from the movement to which they contribute and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or

> dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not in this aspect merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but on the contrary, being indispensable to its continuity. * * * (Id. 515–516.)

The commission men referred to in *Stafford* v. *Wallace* may be likened to the "broker" at New York in this case.

The appellees' main reliance in the court below was on *Atlantic Coast Line R. R. Co.* v. *Standard Oil Co.*, 275 U. S. 257. In holding the shipments involved in that case to be intrastate in character this court said:

> The important controlling fact in the present controversy, and what characterizes the nature of the commerce involved, is that the plaintiff's whole plan is to arrange deliveries of all of its oil purchases on the seaboard of Florida so that they may all be there stored for convenient distribution in the state to the 123 bulk stations and to fuel oil plants in varying quantities according to the demand of the plaintiff's customers, and thence be distributed to subordinate centers and delivery stations, and this plan is being carried out daily. There is neither necessity nor purpose to send the oil through these seaboard storage stations to interior points by immediate continuity of transportation.

> * * * There is nothing to indicate that the destination of the oil is arranged for or fixed in the minds of the sellers beyond the primary seaboard storages of the plaintiff company at Tampa, Port Tampa, Jacksonville or the St. Johns River Terminal. * * *

We think this case is easily distinguished. Here there is "necessity" and "purpose," as shown by the dates of delivery called for by the contracts (R. 63; 66) that the wood pulp go right through "to interior points by immediate continuity of transportation." Further, the interior destination, Garfield, is fixed "in the minds" of the foreign mill, whose cables specify for whom the pulp "aboard a certain steamer" is intended. (R. 46.)

When the facts are viewed in the light of the opinions rendered by the court in the leading cases involving the question of whether commerce is interstate or intrastate the conclusion is inescapable that the character of the traffic here in issue is subject to the jurisdiction of the Commission. This conclusion conforms not only to the well established principles announced by the court in the many cases involving similar questions but conforms to the customs and practices in the foreign trade between this and other countries.

The effect of the decision of the District Court in this case is to seriously restrict the provisions of the Interstate Commerce Act wherein Congress expressly gave the Commission jurisdiction on traf-

fic moving "from or to any place in the United States to or from a foreign country, but only in so far as such transportation * * * takes place within the United States, * * *."

The decree of the lower court should be reversed and the injunction dissolved and bill dismissed.

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